APPENDIX A

COUNT II

1. That on or about September 13, 1966, in the Southern District of Florida, Anthony Esperti, Sam Nick Farinella, and William Joseph Dara, the Defendants herein, did unlawfully and wilfully, obstruct, delay and affect commerce as defined in Section 1951, Title 18, United States Code, and the movements of articles and commodities in commerce, by robbery, in that the Defendants named herein did obtain from John Edward Maloney and the Red Ball Merchandising Corporation, against their will, property of the said John Edward Maloney and the Red Ball Merchandising Corporation, in the form of money, amounting to $2,000, in currency, payment of which was obtained by means of immediate actual and threatened force, violence and fear of injury.

2. At all t mes pertinent thereto, the Red Ball Merchandising Corporation was engaged in the general merchandising business in the city of Hialeah, Florida; that in connection with such business the said Red Ball Merchandisir g Corporation provided supplies, articles and commodities to manufacturers, dealers and suppliers in various states other than the state of Florida which moved in interstate commerce between Red Ball Merchandising Corporation in Hialeah, Florida to the said manufacturers, dealers and suppliers outside of the state of Florida; and furthermore received supplies, articles and commodities from manufacturers, dealers and suppliers in various states other than the state of Florida, which moved in interstate commerce from the said manufacturers, dealers and suppliers; all of the above in violation of Title 18, United States Code 1951.

COUNT III

1. That on or about September 13, 1966, in the Southern District of Florida, Anthony Esperti, Sam Nick Farinella, and William Joseph Dara, the Defendants herein, did unlawfully and wilfully obstruct, delay and affect commerce as defined in Section 1951, Title 18, United States Code, and the movement of articles and commodities in commerce, by extortion, in that the Defendants named herein did attempt to obtain from John Edward Maloney and the Red Ball Merchandising Corporation, with their consent as such, property of the said John Edward Maloney and the Red Ball Merchandising Corporation, in the form of money, in the amount of $25,000, efforts to obtain payment being induced by the wrongful use of actual and threatened force, violence and fear.

2. At all times pertinent thereto, the Red Ball Merchandising Corporation was engaged in the general merchandising business in the city of Hialeah, Florida; that in connection with such business the said Red Ball Merchandising Corporation provided supplies, articles and commodities to manufacturers, dealers and suppliers in various states other than the State of Florida which moved in interstate commerce between Red Ball Merchandising Corporation in Hialeah, Florida to the said manufacturers, dealers and suppliers outside of the state of Florida; and furthermore received supplies, articles and commodities from manufacturers, dealers and suppliers in various states other than the state of Florida, which moved in interstate commerce from the said manufacturers, dealers and suppliers; all of the above in violation of Title 18, United States Code.

APPENDIX B

(Style and Number Omitted) (Filed August 16, 1967)
R. 1240

JUDGMENT AND COMMITMENT AS TO SAM NICK FARINELLA

On this 16th day of August, 1967, came the attorney for the government and the defendant appeared in person and by counsel, Steadman Stahl, Esq.

IT IS ADJUDGED that the defendant upon his plea of Not Guilty and a Jury Verdict of Guilty has been convicted of the offense of interference with commerce by threats or violence, in violation of Title 18, United States Code, Section 1951, as charged in Counts 2 and 3 of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS as to Count 2, or until otherwise discharged by due process of law, and TEN (10) YEARS as to Count 3, or until otherwise discharged by due process of law, it being further

ORDERED that sentence imposed as to Count 3 shall run concurrently with sentence hereinabove imposed as to Count 2.

/s/ W. O. MEHRTENS

UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25194

ANTHONY ESPERTI,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

No. 25233

SAM NICK FARINELLA,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

No. 25234

WILLIAM JOSEPH DARA,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida

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(January 13, 1969)

Before BELL and MORGAN, Circuit Judges and GUINN, District Judge.

GUINN, District Judge: Defendants Dara, Farinella and Esperti appeal from conviction on two counts of violation of the Hobbs Act, 18 U.S.C. Sec. 1591[1] the first anti-racketeering statute passed by Congress. Dara received concurrent seven and one-half years on each count. Farinella and Esperti each received concurrent ten year sentences.

On appeal the facts must be considered most favorably to the Government to support the verdicts. *Glasser v. United States*, 315 U.S. 60 (1942).

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[1] §1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family, or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

John Maloney and Joseph Yeager were fifty percent profit-sharing partners in the Red Ball Merchandising Corporation in Hialeah, Florida. Red Ball sold close-out merchandise. Its interstate sales and purchases amounted to ninety percent of its business.

On September 13, 1966, at 4:00 P.M., Maloney was in his office at Red Ball preparing a deposit slip for a $2000 cash bank deposit received via Western Union for a sale to a Chicago customer. The cash was in $100 bills. Maloney left his office and entered Yeager's office where he saw, for the first time in his life, the three appellants. Esperti and Farinella each had guns. Yeager and an employee, William Waldorf, were also in Yeager's office. Esperti's gun was pointed at Yeager and Farinella's at Waldorf.

Esperti grabbed Maloney, threw him on the couch and told him that, "We're here to get the other $25,000.00 for the man in New York." Esperti put the gun alternatively against Maloney's and Yeager's heads and demanded the $25,000 immediately. Meanwhile Dara left the room and reentered with the deposit slip and the $2000 Maloney had been preparing to put in the bank. He said, "Look what I found" and Esperti took it from his adding, "That don't count toward the $25,000." Farinella added, "You've got a lot of merchandise out there. Sell it. Get the money." They left with the $2000. Yeager kept inquiring to whom Red Ball owed the money. This angered Esperti and he hit Yeager.

Two months later Dara and Maloney met at the Shalimar Restaurant and Dara said that he had received a call from New York City to collect some money from

Yeager. Defense counsel were unable to establish that Maloney or Red Ball or Yeager owed any individual any sum of money.

Defendants were acquitted of Count I, a conspiracy charge. They were also acquitted of two remaining substantive counts concerning events of the following day which are not pertinent here.

The first question presented is the sufficiency of the indictment. The indictment satisfies the requirements of Rule 7(c) of the Federal Rules of Criminal Procedure. It is drafted substantially in the words of 18 U.S.C. Section 1951. See *United States v. Green*, 350 U. S. 415 (1956); *United States v. Debrow*, 346 U.S. 374 (1953); *Turf Center v. United States*, 325 F.2d 793 (9th Cir. 1963).

The next question presented is the sufficiency of the evidence to show that the Defendants robbed Red Ball Merchandising Corporation of $2000 as defined in the Hobbs Act. The evidence is sufficient and establishes that $2000 was taken unlawfully from the Red Ball personnel against their will by means of the threatened force of the guns brandished by Farinella and Esperti. It is clear that the taking of $2000 from a business engaged in interstate commerce would obstruct, delay or affect commerce. *United States v. Provenzano*, 3 Cir. 1964, 334 F.2d 678, 692, cert. denied, 379 U.S. 947 (1964); *United States v. Tolub*, 2 Cir. 1962, 309 F.2d 286, 288; *United States v. Kramer*, 7 Cir. 1966, 355 F.2d 891, 898.

The next contention made by the Defendants is that the attempted extortion and consummated robbery did

not obstruct, delay or affect commerce. This contention is without merit. Once the robbery and attempted extortion of Maloney and Red Ball was established, it was not necessary to show that any particular shipment of merchandise moving to and from Red Ball was obstructed or delayed. It is a depletion of the resources of the business which permits the reasonable inference that its operations are obstructed or delayed. *United States v. Provenzano*, Supra.

The Defendants also contend that the witness Maloney should have not been permitted to refresh his recollection with a copy of a statement given by him to an agent of the FBI. It is hornbook law that any writing may be used to refresh the recollection of a witness. See Wigmore, *Evidence* §758. This is true even where the document itself would be inadmissible as evidence. *Williams v. United States*, 7 Cir., 1966, 365 F.2d 21. Caution must be exercised to insure that the document is actually being used for purposes of refreshing and not for purposes of putting words in the mouth of the witness. Such, however, is within the discretion of the trial judge. *Williams*, supra. There was no abuse of this discretion here.

Defendants also object to the trial court's failure to grant motions for severance and the allowance into evidence of certain hearsay testimony. Both these objections relate to alleged bribery and obstruction of justice issues which may not have been equally applicable to all defendants. Defendant Esperti contends that the refusal to sever and the allowance of the hearsay were particularly harmful to him. Esperti, however, joined in a motion to open up this entire area over the objection of the government

and the advice of the court, and he cannot now be heard to complain of prejudice resulting therefrom.

We have examined the defendants' objections to the court's jury charges including those on reasonable doubt and substantial evidence and the court's refusal to admit into evidence the actual tapes of the alleged bribe attempts, and we find them all without merit.

AFFIRMED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 25,233 and 25,234

SAM NICK FARINELLA and WILLIAM JOSEPH DARA,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Petition for Rehearing of Appeal from the United States District Court for the Southern District of Florida

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COMES NOW the Appellants, SAM NICK FARINELLA and WILLIAM JOSEPH DARA by their undersigned attorneys and file this Petition for Rehearing and as grounds for such Petition, say:

1. The Court overlooked and failed to consider the total absence of any evidence indicating interference with interstate commerce. The mere existence of interstate transactions by a corporation does not prove that anything done relating to that corporation interfered with interstate commerce. The positive evidence discloses the contrary.

2. The Court overlooked and failed to consider the fact that the importance of the $2,000 items required the granting of Appellants' full right to cross-examination of witnesses concerning that $2,000. That right was infringed upon and limited by the Court yet the option of January 13, 1969, of this Honorable Court reflects the importance of the testimony concerning the $2,000.

3. The Court failed to consider the fact that the finding of not guilty on the conspiracy charge required a finding of not guilty of the substantive count. The Court further overlooked and failed to consider that the absence of any evidence supporting the conspiracy count as to these Appellants rendered the admission of testimony concerning that count prejudicial to the rights of Appellants to a calm, unemotional consideration of the facts concerning the charges upon which the guilty judgment was entered. The bulk of the record concerned the conspiracy charge upon which the Defendants were acquitted. The Court overlooked and failed to consider the fact that if the government had been required to prove the existence of a conspiracy before introducing the prejudicial testimony not related to the creation of the conspiracy itself, fair trial could have been afforded Appellants. Under the circumstances, however, prejudice necessarily resulted.

For the foregoing reasons Appellants respectfully request reconsideration and rehearing of these proceedings.

MILTON E. GRUSMARK and
NATALIE BASKIN
Attorneys for Appellants
1674 Meridian Avenue
Miami Beach, Florida 33139

By_____
MILTON E. GRUSMARK

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Rehearing was mailed to WILLIAM G. EARLE, c/o U.S. ATTORNEY, Department of Justice, Criminal Division, Post Office Box 1070, Miami, Florida 33101, Attorney for Appellee, on this — day of January, 1969.

_____
MILTON E. GRUSMARK

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 25233 and 25234

SAM NICK FARINELLA and
WILLIAM JOSEPH DARA,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING

(February 6, 1969)

Before BELL and MORGAN, Circuit Judges, and GUINN, District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28754
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM JOSEPH DARA, SAM NICK FARINELLA and ANTHONY ESPERTI,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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(July 7, 1970)

Before GEWIN, GOLDBERG and DYER,
Circuit Judges.

PER CURIAM: Each of the appellants, Esperti, Dara and Farinella, were found guilty on two counts of violating 18 U.S.C.A. § 1951 (Hobbs Act). Each were also acquitted on a conspiracy count and two substantive counts to violate that Act. In *United States v. Esperti*, 5 Cir. 1969, 406 F.2d 148, we affirmed the judgments of conviction. Certiorari was denied, 394 U.S. 1000, and

rehearing denied, 395 U.S. 954. The appellants then filed a motion for new trial in the District Court on the basis of newly discovered evidence, which was denied. A supplemental motion for new trial, also based on newly discovered evidence, was similarly denied. Appellants appeal from the denial of these motions. We affirm.[1]

The appellants first complain that the trial court erred in denying them an evidentiary hearing on their motion for new trial. It is clear, however, that a motion for new trial may be decided upon affidavits without a hearing. *Gurleski v. United States*, 5 Cir. 1968, 405 F.2d 253, 267, *cert. denied*, 395 U.S. 981; *Lyles v. United States*, 5 Cir. 1959, 272 F.2d 910, *cert. denied*, 356 U.S. 931, 78 S.Ct. 773, 2 L.Ed.2d 761.

Appellants' next contention, that they were entitled to a new trial because one of the prosecuting witnesses had recanted his testimony that $2,000 had been extorted and that the appellants had located a witness present at the time the money was allegedly taken who would corroborate their version of the events, is also without merit. Testimony which is merely impeaching or cumulative is not a sufficient basis for a new trial based on newly discovered evidence. *E.g.*, *Mesarosh v. United States*, 1956, 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed.2d 1; *Batsell v. United States*, 8 Cir. 1968, 403 F.2d 395; *cert. denied*, 393 U.S. 1094, 89 S.Ct. 865, 21 L.Ed.2d 785. In the instant case the trial judge found that the witness, whose testimony appellants sought to impeach, had been subject to "one of the most severe cross-examinations that I have seen in

[1]Pursuant to our Rule 18 this case is decided without oral argument.

quite a long time." Accordingly, we are convinced that the trial judge did not abuse his discretion in refusing to grant the motion for new trial.

Appellants finally argue that the supplemental motion for new trial should have been granted because it was discovered, after the trial, that one of the Government's witnesses was a business associate of the foreman of the jury. While the voir dire is not reflected in the record there is no representation by the appellants that they requested a list of prospective witnesses which would have enabled them to discover the relationship on voir dire. This alone would establish a lack of diligence which would militate against granting a new trial. But more importantly, the witness who was associated with the foreman of the jury was not present in the room when the money was taken and appellants admit that his testimony "primarily alluded to facts circumscribing the alleged conspiracy." Since appellants were acquitted on the conspiracy count appellants have not met their burden of showing prejudice of the juror. *United States v. Provenzano*, 3 Cir. 1965, 353 F.2d 1011, *cert. denied*, 384 U.S. 905, 86 S.Ct. 1340, 16 L.Ed.2d 358.

AFFIRMED

APPENDIX G

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

August 10, 1970

Re: No. 28754-U.S.A. vs. Dara, Farinella and Esperti

Gentlemen:

You are hereby advised that the Court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith. . .